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CITATIONS

626161—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC., PETITIONER

v.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, TREASURY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 971–978) is reported in 143 F. (2d) 218.

JURISDICTION

The order sought to be reviewed was entered on July 7, 1944 (R. 978). On September 13, 1944, the time for filing a petition for writ of certiorari was extended to December 5, 1944 (R. 980). The petition was filed on December 5, 1944. Jurisdiction of this Court is invoked under Section 4 (h) of the Federal Alcohol Administra-

tion Act, 49 Stat. 977, 27 U. S. C. 240 (h) and Section 204 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner has any standing to present the questions of statutory construction urged as the grounds for granting certiorari.

STATUTE INVOLVED

Section 4 of the Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 204), provides in part as follows:

> (a) The following persons shall, on application therefor, be entitled to a basic permit:
>
> (1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.
>
> (2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not

likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) The administrator shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this Act. To the extent deemed necessary by the Administrator for the efficient administration of this Act, separate applications and permits shall be required by the Administrator with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and

with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this Act shall not operate to deprive the United States of its remedy for any violation of law.

* * * * *

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

Reorganization Plan No. III (54 Stat. 1231), prepared pursuant to the Reorganization Act of 1939 (53 Stat. 561), which became effective June 30, 1940, by Joint Resolution of June 4, 1940 (54 Stat. 230, 231), provided that the functions of the Administrator under the Federal Alcohol Admin-

istration Act "shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury." The Secretary of the Treasury delegated the functions of the Administrator "to the Deputy Commissioner of the Bureau of Internal Revenue in charge of the Alcohol Tax Unit, to be exercised by him under the direction and supervision of the Commissioner of Internal Revenue and the Secretary of the Treasury." (Treasury Department Order No. 30, 5 Fed. Reg. 2212). Subsequently these same powers were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them subject to the supervision and direction of the Deputy Commissioner (Treasury Decision 4982, 5 Fed. Reg. 2549).

STATEMENT

On October 26, 1935, petitioner applied for a basic wholesaler's permit (R. 93) on a form (R. 600–601) prescribed by the Administrator of the Act under the authority of Section 4 (c). The applicable instructions (R. 86–92) required the applicant to supply an affidavit describing the persons who owned and managed the applicant, their prior connections, if any, with the liquor industry, and a detailed statement of the business experience of the applicant, its directors and officers, and its stockholders who owned 10 percent or more of the capital stock (R. 88–89).

The information required by the application with respect to the business history of certain officers and stockholders of the applicant was at first omitted (R. 615) and then falsified when the Administrator declined to consider the application without it (R. 617).[1] This falsification consisted in representing that the principal owners and officers of the applicant had been engaged in legitimate enterprises during the period of national prohibition, whereas they had, in fact, been bootleggers (R. 101, 901). The application also falsified statements as to the amount of stock bought by various owners to make it appear that stock amounting to a controlling interest which was actually owned by two of the former bootleggers was owned instead by a banker and preprohibition operator of a legitimate liquor business (R. 94–95, 902). A wholesaler's basic permit was thereafter issued on the application, without a hearing, on July 1, 1936 (R. 609–610).

On April 25, 1940, the Administrator began a proceeding to annul the petitioner's wholesaler's permit and its importer's permit upon the ground that they had been obtained by fraud, misrepresentation and concealment of material fact (R. 26–30). On May 25, 1940, the petitioner answered, claiming, *inter alia,* that it was entitled to the issuance of both permits as a matter of right because it had held an importer's permit on

[1] The original affidavit appears at R. 94–100 and the additional affidavit supplying the requested data is at R. 100–103.

May 25, 1935 (R. 33), and that the owners and managers of the business charged with previously engaging in bootlegging had not been convicted of any of the offenses described in Section 4 (a) (2) A of the Act (R. 38). The proceeding was abandoned as to the importer's permit prior to the hearing, which began on September 9, 1941 (R. 879). At the conclusion of the hearing, the hearing officer found that the petitioner had misrepresented to and concealed from the Administrator material facts in obtaining the wholesaler's permit and recommended its annulment (R. 912–913). An order of annulment was entered by the respondent District Supervisor on April 8, 1942 (R. 914–920). An application for reconsideration was granted and the order sustained after argument before the District Supervisor on May 18, 1942 (R. 935). Upon a further review of the record by the Deputy Commissioner, at the request of the petitioner, the order was affirmed by him on August 6, 1942 (R. 951–952). An appeal was taken to the Circuit Court of Appeals for the Second Circuit pursuant to the provisions of Section 4 (h) of the Act. That court affirmed the Deputy Commissioner's order by its order of July 7, 1944 (R. 978) which petitioner now seeks to have reviewed.

ARGUMENT

Petitioner attacks the Administrator's construction of Section 4 on various grounds. They are sufficiently disposed of in the opinion of the Cir-

cuit Court of Appeals (R. 972–975). We submit, however, that petitioner has no standing to present the questions of statutory construction which it urges as a basis for the granting of certiorari. Petitioner has argued the propriety of the administrative action in this record as though it were appealing from a denial of a permit on the ground that it was legally unfit to hold one instead of the annulment of a permit on the ground that it was obtained by illegal means. It is not disputed that the permit was obtained without a hearing by a misrepresentation of facts thought to be material by both the Administrator of the Act and the petitioner at the time of issuance. The only claim of immateriality is that under a different construction of the statute than that adopted by the Administrator and acquiesced in by the petitioner in the issuance of the permit, the petitioner might have obtained the permit as a matter of right or, upon a hearing, might have persuaded the Administrator that the owners would operate the business in conformity with federal law, notwithstanding their prior bootlegging activities. Neither the Administrator nor the court below made any findings as to the effect to be given the former bootlegging activities of the principal owners and officers of the petitioner in determining the Government's right to withhold the issuance of a permit under Section 4 (a) (2) as petitioner avoided the preissuance hearing under Section 4 (b), in which

such a determination would ordinarily be made, by concealing that bootlegging history and control from the Administrator.

Although petitioner now seeks a review by this Court of the construction of Section 4 (a), adhered to by all parties when the permit was issued and by the Administrator and the court below in this proceeding, the sole purpose of the proceeding was to determine whether or not petitioner had fraudulently procured the permit within the meaning of Section 4 (e) (3). No legislative history, court decisions or legal materials have been cited by petitioner to suggest that Section 4 (e) (3) means anything other than what it says. The policy embodied in this section of the Act is simply one aspect of the general policy of the Government to require those who seek benefits from it to make honest statements in procuring them. The basic statute embodying this requirement is Section 35 (A) of the Criminal Code, 18 U. S. C. 80, originally passed in 1909 to punish criminally the making of false claims but broadened in 1934 to include the willful making or using of any fraudulent statements in matters over which a federal agency has jurisdiction. In *United States* v. *Gilliland,* 312 U. S. 86, the Court said that this amendment "indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive

practices described" (p. 93). In carrying out this policy, Congress has also frequently resorted to statutory provisions, such as Section 4 (e) (3), which deprive persons of the specific benefits procured by dishonest statements to particular governmental agencies.[1]

That petitioner has no right to a review of the Administrator's construction of Section 4 (a) in this proceeding is established by *United States* v. *Kapp*, 302 U. S. 214, and *Kay* v. *United States*, 303 U. S. 1. In the former case, the Court held that a defendant charged with conspiring to violate Section 35 (A) of the Criminal Code by making fraudulent representations in order to procure benefit payments under the Agricultural Adjustment Act of 1933 could not question the authority of the Secretary of Agriculture to require the furnishing of the information in question even though the Act which granted it had been declared unconstitutional in *United States* v. *Butler*, 297 U. S. 1. In so holding the Court said (p. 218):

> It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those

[1] Cf. 30 U. S. C. 227, punishing fraud or dishonest conduct in procuring leases on Navy petroleum reserves by depriving persons guilty thereof of the benefits of such leases; 45 U. S. C. 354, punishing the making or aiding in making of fraudulent statements to procure railroad unemployment insurance benefits by depriving persons guilty thereof of such benefits.

> who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government.

In the *Kay* case the Court held that the constitutionality of the Home Owners' Loan Act was immune to attack in a proceeding charging a violation of Section 8 (a) of that Act, 12 U. S. C. sec. 1467 (a), which punishes the making of false representations for the purpose of influencing action on a loan application. In so holding, the Court said (p. 6):

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

A fortiori, one who misleads an administrative officer of the Government by false statements has no standing to assert that the proceeding in which the statements were made was without statutory sanction.

CONCLUSION

The decision below is correct and no question of statutory construction is presented. It is

respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1945.

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